No. 420.

Brf. of Evans for

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 420.

FRED LEE RICE ET AL.

*vs.*

JOHN C. AMES, MARSHAL OF THE NORTHERN DISTRICT OF THE STATE OF ILLINOIS.

Appeal from the District Court in and for the Northern District of the State of Illinois, Northern Division thereof.

## BRIEF ON MOTION TO DISMISS OR AFFIRM, OR ADVANCE THE CAUSE.

LYNDEN EVANS,
ATTORNEY FOR APPELLEE.

BARNARD & MILLER PRINT, CHICAGO.

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JOHN C. AMES, MARSHAL OF THE NORTHERN DISTRICT OF THE STATE OF ILLINOIS.

**Appeal from the District Court in and for the Northern District of the State of Illinois, Northern Division thereof.**

*To the Honorable, the Judges of the Supreme Court of the United States:*

Now comes John C. Ames, United States Marshal for the Northern District of the State of Illinois, named as appellee herein, by Lynden Evans, his attorney, and moves the court to dismiss the appeal herein, or to affirm the judgment below pursuant to rule 6 of this court, and in case neither of said motions are granted, then to advance the cause, the grounds for such motions being shown in the brief following. And said defendant further shows to the court that the controlling facts are as follows, as appear from the printed portions of the record submitted herewith. On June 14, 1900, a complaint under the Extradition Act was filed with and sworn to before Mark A. Foote, a United States Commissioner, duly authorized to act as such by order of the said District Court, as provided by section 5270, Revised Statutes, an officer of the government of Canada signing and verify-

ing the application, and a writ was duly issued by said commissioner, under which appellants were arrested. Hearings were had before said commissioner, and upon July 10, 1900, the commissioner decided that the prisoners should be held, and sent a copy of the proceedings to the Secretary of State pursuant to the statute, and the sixty days provided in which the President's warrant must issue has expired. On July 11, 1900, a petition for habeas corpus was filed in the District Court for the Northern District of Illinois praying that the prisoners be released because (1) the affidavit to the application was upon information and belief; (2) because a continuance was had before the commissioner for more than ten days; (3) the authentication by William L. Sewell, United States consul, of the depositons, was wholly defective and insufficient, and that all the depositions were insufficiently authenticated; (4) that there was not sufficient legal evidence introduced to prove a probable case of guilt, and further, that Section 5270, Title 66 of the Revised Statutes of the United States is unconstitutional, and is in contravention of Section 1, Article 3 of the Constitution of the United States, and that there was no constitutional power in the District Court to appoint commissioners in extradition; that there is no constitutional power for Congress to delegate to a District Court the power to establish such a tribunal, and that the prisoners had been refused bail,—the substance of which petition is contained in the assignments of error printed in the printed portions of the record submitted herewith. The writ issued, the prisoners were produced in court by said Marshal, issue was joined, a hearing was had and the writ was discharged, whereupon an appeal was prayed and allowed to this court.

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## BRIEF.

### I.

*That there is no provision in the law in force when this appeal was prayed and allowed for an appeal in this class of cases.*

Since March 3, 1803, (2 Stat. C. 40) no appeals have been entertained in this court, in cases at law, appeals being allowable only in chancery and admiralty. These remedies can never in the Federal Court be used interchangeably.

The San Pedro, 2 Wheat., 132.
*Brooks* v. *Norris*, 11 How., 204.
*Sarchet* v. *U. S.*, 12 Pet., 143.
*Ballance* v. *Forsyth*, 21 How., 389.
*Walker* v. *Dreville*, 12 Wall., 440.
*Bondvrant* v. *Watson*, 103 U. S., 278.
*Ex parte* Ralston, 119 U. S., 613; 7 Sup. Ct., 317.

But it may be urged that in sections 763 and 764 of the Revised Statutes of the United States an appeal was allowed in habeas corpus proceedings, and that cases are to be found in the reports of this court where appeals in such cases have been retained, but it is a sufficient reply to say that the said sections referred to appeals from any inferior court to a Circuit Court, and for an appeal from the decisions of the Circuit Court to the Supreme Court, but the said sections 763 and 764 together with the amendment thereto, of March 3, 1885, which was a substitute for section 764 of the original act, have been re-

pealed by the act of March 3, 1891, establishing Circuit Courts of Appeals, inasmuch as the entire appellate jurisdiction is by that act divided between this Court and the Circuit Courts of Appeal.

*McLish* v. *Roff*, 141 U. S., 661; 12 Sup. Ct., 118.

*Lau Ow Bew* v. *U. S.*, 144 U. S., 47; 12 Sup. Ct., 517.

It is apparent that the Circuit Court of Appeals Act is the only act under which a review of a judgment of any district court could be had in this court. Before that act no case could come here directly from a district court.

*Bank* v. *Peters*, 144 U. S., 570; 12 Sup. Ct., 767.

*Little Rock & M. R. Co.* v. *East Tennessee & G. R. Co.*, 159 U. S., 698; 16 Sup. Ct., 189.

*Webster* v. *Daily*, 163 U. S., 155; 16 Sup. Ct., 961.

Prior to the last mentioned act appeals from the District Court went to the Circuit Court. This case now pending in this court therefore depends entirely upon the Circuit Court of Appeals Act of March 3, 1891.

That act must, therefore, it is urged, be considered as a repeal of sections 763 and 764 and the amendment of March 3, 1885, to said section 764 of the Revised Statutes.

If the language of the act of March 3, 1891, were to be construed literally, without any reference to previous construction of like words or sentences used therein, then either an appeal or writ of error might be resorted to in any case, either in law or equity. But the provision should be construed with reference to the hitherto existing law and practice in cases of review where like words have

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been used. This has been decided by this court in *Bucklin* v. *United States,* 159 U. S., 680; 16 Sup. Ct. Rep., 182. That case construed the act of March 3, 1891, creating Circuit Courts of Appeals, and held that: "There was no purpose by that act to abolish the general distinction at common law between an appeal and a writ of error. The final judgment of a court of the United States in a case of the conviction of a capital or otherwise infamous crime is not reviewable here, except upon writ of error."

The Bucklin case arose under the *third* provision of section 5 of the act of March 3, 1891, relating to a review of a conviction for a capital crime, etc., and the present case must be considered to have been brought under the *fifth* provision of said section 5 of the act of March 3, 1891, relating to a review of judgments involving the constitutionality of any law of the United States or construction of any treaty, etc. The decision above quoted in the Bucklin case will therefore exactly apply, *mutatis mutandis.*

It may be admitted that there may be cases where the distinction between appeals and writs of error has not been preserved, but those were cases in which the question was not raised; and, as was said in *Cross* v. *Burke,* 146 U. S., 82; 13 Sup. Ct. Rep., 22, referring to the decision in *Wales* v. *Whitney,* 114 U. S., 564, in a case in which the question of jurisdiction was not raised, "the Court does not consider itself bound by the view expressed." Here upon this motion the right to an appeal under the act of March 3, 1891, under which only this case can come here, is directly raised by this motion, and the only direct adjudication I find upon it is the Bucklin case, *supra.* I therefore submit that the appeal should be dismissed.

## II.

*The only errors that can be assigned herein, in this court must question the constitutionality of the act of Congress on Extradition (Rev. Stat. Title LXVI, Secs. 5270-5280) or the treaty between the United States and the United Kingdom, of 1842 and that of 1889, determining what crimes are extraditable; but this act of Congress and said treaties have been acted upon so long and have been so often construed in this Court that it is frivolous or merely a means of delay at this day to argue that they are not constitutional.*

If your Honors retain this appeal, I then urge that the judgment should be affirmed, because on the face of the record it appears that the appeal is frivolous and taken for delay. This will be manifest from a very brief inspection of the errors assigned.

The first error assigned is that the United States Commissioner who heard the case below, pursuant to the statute on extradition, had no jurisdiction, because the application was made on information and belief. This is a habeas corpus matter and not a writ of error, and errors in pleading and practice are not therefore assignable here. The purpose of a writ of habeas corpus is not to correct mere errors or technicalities.

*Benson* v. *McMahon*, 127 U. S., 457; 8 Sup. Ct., 1240.

Furthermore an application on information and belief is proper.

*Ex parte* Lane, 6 Fed. Rep., 34.
Moore on Extradition, Sec. 285.

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The next error assigned is that the Commisioner continued the case for more than ten days, which is not in conformity with any law and in violation of section 6 of the treaty of 1889, the laws of the United States and the State of Illinois. Neither said treaty nor the laws of the United States regulates or even refers to the discretion of courts in granting continuances, and the laws of Illinois can have no application to a proceeding under a federal and not a state power. Furthermore, what laws are referred to are not pointed out.

The rule seems to be settled that the length of adjournment is within the discretion of the magistrate.

*In re* Henrich, 5 Blatchf., 414, an adjournment was had for thirty days. *In re* Farez, 7 Blatchf., 35, a number of adjournments were had, amounting in all to twenty-six days, and the only question that can be raised upon review is abuse of discretion, which is not a constitutional question. The supposed error is not assignable here for the same reason as the first error, *i. e.*, this is not a writ of error to the original proceeding.

The next assignment of error is put in argumentive form; it is that the commissioner had no jurisdiction, because section 5270, title 66 of the Revised Statutes is unconstitutional, (1) because it does not provide for any mode of procedure relating to continuances, changes of venue, bail, etc., before the commissioner appointed in extradition matters by the District Court of the United States. (2) Said section 5270, title 66 is unconstitutional, because Congress had no power to confer upon a District Judge of the United States power to create such inferior courts. (3) Because said magistrate is exercising judicial power in the premises and Congress

has not created such a court and established its jurisdiction, powers, etc.

It seems apparent that this first section of this assignment is frivolous, for the idea that an act is unconstitutional because it does not provide for rules of practice in cases arising under it, has been, up to the date of the assignment of errors herein, unheard of, and is not serious on its face.

Number 2 is frivolous because in the act in question Congress does not attempt to confer upon a District Judge any power to create "inferior courts." The words of the statute are a sufficient answer to this part of the assignment.

An examining magistrate, such as a commissioner, is not a court in the real sense of that word. The commissioner who hears applications for extradition is in no sense trying the prisoners.

*Benson* v. *McMahon*, 127 U. S., 457.

Number 3 of said assignment is a contradiction, because the statute expressly names commissioners as having authority to hear applications for extradition, but here again the word "court" is not used in this assignment of error in the correct sense.

The point is, I suppose, that all commissioners have not this power, but any commissioner may make application to a District or Circuit Court and act under the order of such court. This is not the creation of a court by another court, but a means of keeping record of all commissioners who are authorized to act.

Numbers 2 and 3, however, grow out of a misuse of the word *court*. The reasoning in *United States* v. *Fer-*

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*reira,* 13 How., 40, settles that question, and to again raise it is only dilatory.

*In re* Kane, 14 How., 103, the power of such commissioners was considered. In that case the commissioner acted under the same statute now called in question, and his action was sustained by the majority of the court, and the question of the power of the commissioner to act was upheld by the dissenting members of the court, but they held that the foreign minister must first make a demand for a warrant.

The confusion existing in this assignment grows out of the fact that it is forgotten that section 5270 of the revised statutes was enacted to enforce, among other treaties, the treaty with Great Britain now in question, which treaty provided that "the respective judges and other magistrates of the two governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of fugitives.

I, therefore, submit that the question on the second and third sections under the last mentioned assignment of error are utterly untenable because confusing a court with its power to sentence prisoners, with what amounts to a mere examining magistrate who has no power but to hold prisoners to a court for trial, or in this case to recommend that the president so hold.

If, however, you disregard the three reasons given for this assignment of error, and consider it by itself, then it is equally untenable.

The power to pass this act grows out of and exists under the treaty clause of the constitution, and was discussed and settled in 1840 in *Holmes* v. *Jennison,* 14 Pet., 540. There the question was as to the power of the Gov-

ernor of Vermont to surrender a criminal to Canadian authorities, and the court was equally divided, but all five opinions uphold such power in the federal government under the constitution. The very sections of the statute in question were acted upon in a learned and exhaustive opinion by the late Justice Miller in *United States* v. *Rauscher,* 119 U. S., 412, and the treaty in question, herein called unconstitutional in the errors assigned, was therein held to be part of the supreme law of the land.

The power to deliver fugitive criminals to other nations has always been recognized in this country. There was a provision for the mutual delivery of murderers and forgers between the United States and Great Britain in the treaty negotiated by Mr. Jay in Washington's administration. Thomas Jefferson considers this power undisputed. Letter to Mr. Genet, September 12, 1793. 1 Am. St. Pap., 175.

Mr. Justice Blatchford, *In re* Angelo De Giacomo, 12 Blatch., 391, says "It is not to be questioned that a treaty stipulation on the part of the government of the United States, to surrender fugitives from justice, is a lawful stipulation and within the authority of the treaty making power."

The next assignment of error, namely, that the petitioners were denied bail is frivolous, because it is not a constitutional question and cannot be assigned in this court. And this question was settled, in principle, in the Jonathan Robbins case, Wharton's State Trials, p. 403, where it is pointed out the provision for jury trials in the constitution applies only to crimes committed within the United States, and therefore cases in extradition for crimes committed out of the United States are not governed thereby.

The next assignment of error is a mere statement that the court below erred, and does not point out any error.

The additional assignment of error refers only to continuances, and only shows that the examining magistrate took sufficient time to read the large amount of testimony offered.

Thus it manifestly appears that this case is brought here upon no really controverted question, that the errors assigned are either frivolous or refer to questions so long and so often settled, that the judgment of the court below ought to be affirmed.

## III.

*The importance of the demanding government, the United Kingdom; the fact that the appellants have already been in custody for over six months, and may remain so for a year more, it is submitted, is ground to advance the cause, if neither of the above motions prevail.*

If your Honors are of the opinion that the case should be retained and heard on the merits, then I beg to suggest as grounds to advance the hearing the importance of the demanding government, the United Kingdom, and the fact that the rights given by a solemn treaty of the United States with the United Kingdom are involved and the fact that, in the ordinary course of your Honors congested docket, it would be necessary for the three appellants to remain in jail for a year or more, in all probability, and that the President's warrant, which the statute says must be issued within sixty days must be legally presumed to have issued, as it has, for if it had not, appellants would have been released long ago, and this cause would not be here. Furthermore, the delay common to

our more deliberate juridical procedure in this country, is not understood beyond our own land, and as a consequence the force and dignity of our administration of law suffers in the estimation of foreigners, with whom our national relations are yearly growing more and more intimate.

This question then involves our action under one of our treaties with foreign nations and on this ground, and the others above set forth, I ask that the cause be advanced for hearing to as early a day as may be convenient to your Honors, if not dismissed or affirmed, as above prayed.

Respectfully submitted,

Lynden Evans

Attorney for Appellee

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